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# THE PANAMA CANAL CONTROVERSY

## A LECTURE

DELIVERED BEFORE THE UNIVERSITY OF OXFORD ON OCTOBER 25, 1913

BY

SIR H. ERLE RICHARDS

K.C., K.C.S.I., B.C.L., M.A.

CHICHELE PROFESSOR OF INTERNATIONAL LAW AND DIPLOMACY
AND FELLOW OF ALL SOULS COLLEGE
ASSOCIATE OF THE INSTITUTE OF INTERNATIONAL LAW

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# THE PANAMA CANAL CONTROVERSY

## Introductory.

The near approach of the time when the Panama Canal is to be opened for public traffic has brought to a head the controversy between this country and the United States in regard to the tolls to be imposed on British Shipping which makes use of the new waterway. There are rumours that the President of the United States intends to propose the repeal or suspension of the clauses of the Canal Act to which Great Britain has taken exception: these rumours are as yet without confirmation, and in any case it is not possible to anticipate the judgement of the legislative bodies with whom the decision would rest. But whether such a proposal be made or not, there is certain to be much public discussion of the question in the next few months. It is one of grave importance, and it is one on which the public of this country should be in a position to form its own judgement. I have therefore thought it opportune to submit to the University to-day a statement of the points at issue between the two nations, and to express the opinion I have formed upon the materials which have so far been placed before the public. It is, of course, impossible within the time at our disposal to discuss, or even to mention, the whole of the numerous documents which are relevant to the inquiry and must necessarily be put in evidence before any tribunal which may be called upon to give judgement upon the matter. I can only attempt to refer you to

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the more important of them, and to present to you a summary of the more material facts. It is difficult in a public lecture to make clear to the audience questions which arise on the construction of written documents which cannot be conveniently placed before them, but I shall endeavour to avoid this difficulty to some extent by exhibiting the leading passages on the screen behind me as I proceed. The matter has been much discussed in the United States, and to a less extent in this country, and I cannot pretend to add anything new to what has been already said by others. I shall be content if I succeed in making clear to you the main contentions on either side, and the reasons which have led me to the conclusion to which I have come.

With this preface, I turn to the difference between the two countries as to these Panama tolls. Briefly it is this—the United States claim that they have the right to discriminate between their own vessels and those of this country, or, in other words, that they can remit tolls on American vessels without giving corresponding relief to British ships, or can charge lower tolls on their own vessels as compared with those imposed on the ships which fly the British flag. That is the full claim made by the Government of the United States, and the Panama Canal Act, passed by the American Legislature in 1912, empowers the President to give effect to that claim if, and when, he shall think right to do so. His Majesty's Government, on the other hand, contend that the United States have bound themselves by the Treaty between the two nations of 1901, generally known as the Hay-Pauncefote Treaty, to make no discrimination as against British vessels, and that the claim made by the United States and the powers conferred by the Canal Act are contrary to that Treaty in so far as they affect or may affect the shipping of this

country. That is the main controversy, and the only controversy which we need consider for the moment. There is a subsidiary point as to whether the exemption from tolls of American coastwise shipping would be an infringement of the Treaty, even on the British construction, and upon that I will say a word or two at a later stage.

Turning, then, to the main controversy, we have to observe in the first place that the United States have now obtained sovereign control over the Canal—in the words of Sir E. Grey, they are the 'practical sovereigns' of it. It follows that, in the absence of any limitation of their sovereign power, they can impose tolls at such rates and with such exemption and discrimination as they please. The onus is on Great Britain to establish that these powers have been restricted, and this she seeks to do by reference to the Hay-Pauncefote Treaty of 1901.

The difference between the two countries turns, therefore, primarily on the construction of the Treaty of 1901, and I now invite your attention to it, and in the first instance to the preamble and to Article III, Rule 1, on which Great Britain relies. To the rest of the Treaty I will return at a later stage.

### Preamble.

His Majesty Edward the Seventh, . . . and the United States of America, being desirous to facilitate the construction of a ship-canal to connect the Atlantic and Pacific Oceans, by whatever route may be considered expedient, and to that end to remove any objection which may arise out of the Convention of the 19th April, 1850, commonly called the Clayton-Bulwer Treaty, to the construction of such canal under the auspices of the Government of the United States, without impairing the 'general principle' of neutralization established in Article VIII of that Convention.

. . . . . .

ARTICLE III.

The United States adopts, as the basis of the neutralization of such ship-canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

You will observe that Article III provides in express terms that the vessels of all nations observing the Rules embodied in the Treaty are to have the use of the Canal on equal terms and without discrimination. The words 'all nations' are not qualified in any way: there is no exception in regard to vessels of the United States. But the matter does not rest there. The preamble refers to a 'general principle of neutralization' established in an earlier Treaty of 1850, and Article III is intended to give effect to the principle so established: so that it is not possible to construe the Treaty of 1901 without taking into account the principle established in 1850, and reaffirmed in the later Treaty. It is necessary, therefore, for us first to go back to 1850 and to appreciate the state of things which led up to the agreement of that year, the position of the two parties to it, and the Canal projects which were then before the minds of the negotiators; and then to see what the intention of the two nations was in entering into that arrangement. These matters will be made the more clear if I recall to you, as briefly as may be, the history of the various

Canal schemes, and refer you to a map which shows the material localities. You will find that the geographical position of the Canal throws some light on the construction of the Treaty.

### History of the Canal Projects.

The advantages of some waterway for sea-going ships from the Atlantic to the Pacific has been recognized from the earliest times, indeed it is but necessary to glance at an atlas to realize the immense commercial importance of some direct connexion between the two oceans. Here is this great continent stretching across the face of the globe from North to South forming an impenetrable barrier to the traffic of the world as it goes from East to West or from West to East. There is no way round that barrier to the North, for there the relentless ice forbids the passage of shipping, and the only possible way for vessels to pass from one to the other side of the American continent has been the route which, by a détour sometimes double or more in length to the direct line across the Isthmus, but always substantially longer, circumnavigates the Southern extremities and takes its way round Cape Horn or through the Straits of Magellan. Europe has made for herself another outlet to the East: she has broken through the land barrier which separated the Mediterranean from the Eastern Seas, and can send her traffic to India, to China, to Japan, or to Australia by means of the Suez Canal. But that route cannot serve the Eastern ports of the American continent. Traffic from Oriental countries to those ports, whether to Montreal or New York, to New Orleans or the West Indies, or from them to the Orient, must travel by sea round the South of the continent, and that is still the only means of communication by ship between the Western and

Eastern coasts of the British Dominion of Canada or of the United States. It is stated that between Great Britain and her colony of New Zealand the passage round Cape Horn is longer by more than 1,100 miles than the route across the Isthmus. I need not stop to give you further instances, the advantages to trade are obvious. It is no matter of surprise, therefore, that the project of a waterway connecting the Atlantic and Pacific Oceans has long been under the consideration of the world. As far back as 1550 the matter was brought to the attention of the Spanish Government, and proposals of various kinds have been made and discussed ever since. At that early time four routes were suggested, those of Darien, Tehuantepec, Nicaragua, and Panama—a fifth has since been added, that by way of the Atrato and Tupica Rivers in Colombia; and there may be others. The failure of the Darien Company, formed by William Paterson in 1695, is a matter of history: the same project was renewed at a later time, but only to fail again, and it need not further occupy us. Along the Tehuantepec route there is now a railway running: it was opened in 1907, and does a considerable trade: it will compete, and probably not unsuccessfully, with the Panama Canal for the traffic on certain lines, since it effects a considerable saving in mileage on such journeys as those from New York and New Orleans to Chinese and Japanese ports and to San Francisco. The Atrato project has come into notice within the past few weeks in connexion with an industrial concession granted by the Colombian Government. But it is the Nicaraguan and Panama routes which are alone material for our purpose to-day. That by the Panama has now been adopted, but I ask you to take note that throughout all the earlier negotiations between Great Britain and the United States, and indeed until 1901, the Nicaraguan

route was supposed by the two Governments most concerned to be the best available. The difficulties encountered by the French Company, formed under the auspices of M. de Lesseps in 1881, in constructing a sea-level canal across the Isthmus of Panama were thought to be insuperable, and it was only after the Treaty of 1901 that the scheme for a canal above sea-level was accepted by the Senate of the United States and the Panama route was finally determined on. This fact is material in the consideration of the Treaties of 1850 and 1901.

But though proposals for some canal date back to these early times, it was long before the matter appeared on the stage of practical politics: indeed that did not happen before the earlier part of the nineteenth century. At that time the rising power of the United States caused the project to become one of increasing interest to that nation, and accordingly from this date onwards we find declarations of policy made by the Government of the United States in regard to an inter-oceanic canal if constructed. I shall not refer to them here in detail, but it is important to notice that there is this significant feature common to all of them which is material to the present controversy: to wit, that always one condition insisted on as fundamental, is that free and equal right of passing through any canal must be secured to all nations without discrimination. This was declared by Henry Clay, the United States Secretary of State in 1826; it was affirmed by the resolution of the Senate of the United States on March 3, 1835; it was reiterated by President Jackson on January 9, 1837, by the House of Representatives in 1839, by President Polk in his message to the Senate of February 10, 1847, and by President Taylor on December 4, 1849. There is no need to multiply references, for it can be shown, I think, beyond dispute that the Canal policy of the

United States up to 1850, and that is the only period we are now discussing, was uniform and unvaried, and that it was based on the dominant principle that the Canal, whenever and wheresoever constructed, should be open to all nations on equal terms.

Now about the year 1850 the question of a canal had become a matter of more urgent importance for the United States. They had then just come into possession of the great territories which form to-day the States on their Western coast, and it was essential to have some means of communication between East and West if the Central Government located in the Eastern States was to hold its own. Oregon, Washington, and Idaho had been definitely acquired in 1846; California, Nevada, Utah, and Arizona had become part of the United States dominions under the Mexican cession of 1847. But there were no railways and no means of transporting commerce by land save by road; and to make the matter still more pressing, the discovery of gold in California in 1848 had caused a rush of passengers and of trade to that State, which demanded some better means of communication than the slow progress of the coach or the long journey round Cape Horn. It is true that this want was afterwards supplied by the making of railways, but it was not till 1869 that the first line was made across the continent, so that in 1850 the importance of a sea route was not diminished by any anticipation of an immediate railway communication. But in the position in which they then stood, the United States could do little to make any sea communication without the assistance and assent of Great Britain. That Power had special interests as the largest carrier and the greatest trader in the world, and her aim was then, as it is now, to secure the passage of her vessels through any canal that might be constructed on the

same terms as her commercial rivals. The possibility of any discrimination in tolls between her shipping and that of the United States would have been to her then, as it would be to her to-day, a grave blow to her carrying trade and to her commerce. But the important point is that she was at that time in a position to enforce those interests, for not only did she hold the command of the Caribbean Sea—her superior naval force and the possession of her West Indian Islands gave her that—but she was also in actual occupation of the greater portion of the coast of Nicaragua and of Greytown (or San Juan de Nicaragua), the expected terminus of the Canal. At least as far as the Nicaraguan Canal was concerned she was in a dominant position; it was within her power to control the whole of that Canal enterprise and to dictate her own terms to the promoters. The United States had on their side done what they could to secure equal treatment for their ships. They had made a treaty with New Granada (within whose territories Panama then was) in 1846 ensuring equal treatment for their own vessels as compared with those of New Granada in return for a guarantee for the sovereignty of the latter State; but this gave them no exclusive rights, nor did it bind New Granada to discriminate against their commercial rivals. They had also made some attempts to obtain a treaty from Nicaragua, and to these I must now refer as part of the narrative. In 1849 the United States *charge d'affaires*, Mr. Hise, had obtained a convention giving the United States exclusive power over a canal through Nicaraguan territory; but this he had done without authority and his convention did not meet with the approval of the United States Government; and it is especially to be noted that the main reason which determined them was their opinion that no nation should attempt to monopolize to itself the

advantages to be derived from a canal when erected. Mr. Hise's convention was therefore abandoned, and the United States instructed his successor, Mr. Squier, to obtain a new convention, with a stipulation that vessels of all nations should be permitted to pass through the proposed canal subject to no higher rates or charges than those imposed on vessels of the United States.[1]

These incidents show beyond a doubt that at the very time the Treaty of 1850 was under negotiation the policy of the United States remained unvaried; it was the policy of a canal open to all on equal terms. Indeed no other policy was possible, at least so far as Nicaragua was concerned, so long as Great Britain was in occupation of the coast through which a canal must find its way to the sea. It was the stress of this position which made the United States approach Great Britain and seek to effect some arrangement by which the position of American shipping might be rendered secure in the event of any canal being constructed. The Treaty was sought by the United States for their own protection.

## The Clayton-Bulwer Treaty of 1850.

Diplomatic negotiations were opened in the first instance by a verbal communication from Mr. Rives, acting on the instructions of the United States Government, to Lord Palmerston. Those instructions were in these terms:

'The United States sought no exclusive privilege or preferential right of any kind with regard to the proposed communication, and their sincere wish, if it should be found practicable, was to see it dedicated to the common use of all nations on the most liberal terms and a footing of perfect

[1] British Blue Book, *Correspondence with the United States respecting Central America*, 1856, pp. 1, 2, 5.

equality for all. That the United States would not, if they could, obtain any exclusive right or privilege in a great highway which naturally belonged to all mankind.'

Lord Palmerston intimated in reply that Her Majesty's Government concurred in this condition.[1] This was followed at a later stage by a letter from Mr. Abbot Laurence to Lord Palmerston, dated November 8, 1849,[2] in which he formally asks whether the British Government would unite with the United States in guaranteeing the neutrality of a ship canal, railway, or other communication, to be open to the world and common to all nations. The answer of Lord Palmerston is dated November 13 and the material passage is in these words:

'With regard to the second part of your inquiry I beg to say that Her Majesty's Government will feel great pleasure in combining and co-operating with the Government of the United States for the purpose of assisting the operations of any company which may be formed with a view to establish commercial communication by canal or railway between the Atlantic and Pacific across the isthmus which divides the Northern from the Southern portion of the American continent, both by obtaining local security for the works while in progress and when completed and in use, and by placing such communication through the means of political arrangements beyond the reach of molestation, disturbance, or destruction by reason of international disputes which may at any time unfortunately arise, *upon the condition, moreover, that such communication should at all times be open and accessible for the commerce of all nations upon equal terms for all.*'[3] *

I call your particular attention to this last condition, which was, in effect, an acceptance of the terms proposed by Mr. Rives on behalf of the United States.

[1] Blue Book, p. 7. [2] Ibid., p. 6. [3] Ibid., pp. 7, 17.

* *Note.* The italics in this and subsequent passages are not in the original.

It was on this footing that the negotiations commenced which resulted in the Clayton-Bulwer Treaty of 1850. It is manifest, as I submit, that the intention of both parties was that the passage through any canal that was made should be free to the two nations on equal terms. I now invite your attention to the material terms of that Treaty.

[1] CONVENTION between Her Majesty and the United States of America, relative to the Establishment of a Communication by Ship-Canal between the Atlantic and Pacific Oceans.

Her Britannic Majesty and the United States of America being desirous of consolidating the relations of amity which so happily subsist between them, by setting forth and fixing in a Convention their views and intentions with reference to any means of communication by Ship-Canal, which may be constructed between the Atlantic and Pacific Oceans, by the way of the River San Juan de Nicaragua, and either or both of the Lakes of Nicaragua or Managua, to any port or place on the Pacific Ocean;

. . . . . .

ARTICLE I.

The Governments of Great Britain and the United States hereby declare that neither the one nor the other will ever obtain or maintain for itself any exclusive control over the said Ship-Canal; agreeing that neither will ever erect or maintain any fortifications commanding the same, . . . Nor will Great Britain or the United States take advantage of any intimacy, or use any alliance, connexion, or influence that either may possess with any State or Government through whose territory the said canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the subjects or citizens of the one, any rights or advantages in regard to commerce or navigation through the said canal, which shall not be offered, on the same terms, to the subjects or citizens of the other.

[1] App. A, *post*, p. 39.

ARTICLE V.

The Contracting Parties further engage that when the said canal shall have been completed, they will protect it from interruption, seizure, or unjust confiscation, and that they will guarantee the neutrality thereof, so that the said canal may for ever be open and free, and the capital invested therein secure. Nevertheless, the Governments of Great Britain and the United States, in according their protection to the construction of the said canal, and guaranteeing its neutrality and security when completed, always understand that this protection and guarantee are granted conditionally, and may be withdrawn by both Governments, or either Government, if both Governments, or either Government, should deem that the persons or company undertaking or managing the same adopt or establish such regulations concerning the traffic thereupon, *as are contrary to the spirit and intention of this Convention*; either by making unfair discriminations in favour of the commerce of one of the Contracting Parties over the commerce of the other, or by imposing oppressive exactions, or unreasonable tolls upon passengers, vessels, goods, wares, merchandise, or other articles.

. . . . . .

ARTICLE VI.

The Contracting Parties in this Convention engage to invite every State with which both or either have friendly intercourse, to enter into stipulations with them similar to those which they have entered into with each other, to the end that all other States may share in the honour and advantage of having contributed to a work of such general interest and importance as the canal herein contemplated; and the Contracting Parties likewise agree that each shall enter into Treaty stipulations with such of the Central American States as they may deem advisable, *for the purpose of more effectually carrying out the great design of this Convention; namely, that of constructing and maintaining the said canal as a ship communication between the two oceans for the benefit of mankind, on equal terms to all,* and of protecting the same;

. . . . . .

ARTICLE VIII.

The Governments of Great Britain and the United States having not only desired, in entering into this Convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection by Treaty stipulations to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America; and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, their joint protection to any such canals or railways as are by this Article specified, it is always understood by Great Britain and the United States, that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable; and that the same canals or railways, being open to the subjects and citizens of Great Britain and the United States on equal terms, shall also be open on like terms to the subjects and citizens of every other State which is willing to grant thereto such protection as Great Britain and the United States engage to afford.

Now the object and scheme of this Treaty are clear. Both parties contemplated that the Canal would be constructed by private enterprise, and, indeed, there were already in the field a Company promoted by Mr. Vanderbilt, with a concession from the Nicaraguan Government, and a company partly American, partly British, with a concession for the Panama route; they also contemplated that the Canal would be constructed within the sovereignty of some third State. But in order to induce capitalists to join in the enterprise it was necessary that there should be a guarantee of protection against destruction or seizure of the Canal, a protection obviously essential in view of the frequent changes of Government

in the Central and South American States at the time.[1] Then, as between themselves, in order that Great Britain should not take advantage of her territorial claims to the disadvantage of the United States, and that the United States should not obtain treaty rights from third Powers to the disadvantage of Great Britain, it was agreed [2] that neither the one nor the other should obtain exclusive control over the Canal, or any rights and advantages in regard to commerce and navigation which should not be offered on the same terms to the other. And I ask you to note that this principle of equal treatment pervades the whole Treaty; the making of unfair discriminations in favour of one of the Contracting Parties over the commerce of the other is referred to in Article V as contrary to 'the spirit and intention of the Convention', and in Article VI the 'great design of this Convention' is stated to be the construction of a Canal for the benefit of mankind on equal terms to all. Article VI contains a provision enabling other States to become parties to the arrangement and to share in these benefits.

I have already shown you that the condition of equal treatment had from the first been a leading feature of the policy of the United States in regard to any inter-oceanic Canal, and I have read to you the passage from Lord Palmerston's letter of November 13, in which he accepts that condition at the outset of the negotiations, as the basis of the agreement to be made between the two countries; but there is one further piece of evidence which establishes the intention, at least, of the United States beyond any possible doubt. The Convention was signed on April 19, and on April 22 the President of the United States, Mr. Taylor, submitted it to the Senate for ratification with the following message, explaining the objects which it was intended to effect.[3]

[1] Article V. [2] Article I. [3] Blue Book, p. 210.

IN SENATE, APRIL 22, 1850.

The following message from the President of the United States was received, read, and referred to the Committee on Foreign Relations, and ordered to be printed in confidence for the use of the Senate:

TO THE SENATE OF THE UNITED STATES:

I herewith transmit to the Senate, for their advice with regard to its ratification, a Convention between the United States and Great Britain, concluded at Washington on the 19th instant, by John M. Clayton, Secretary of State, on the part of the United States, and by the Right Honourable Sir Henry Lytton Bulwer, on the part of Great Britain.

This Treaty has been negotiated in accordance with the general views expressed in my message to Congress in December last. Its object is to establish a commercial alliance with all great maritime States for the protection of a contemplated Ship-Canal, through the territory of Nicaragua, to connect the Atlantic and Pacific Oceans, and, at the same time, to insure the same protection to the contemplated railways or canals by the Tehuantepec and Panama routes, as well as to every other interoceanic communication which may be adopted to shorten the transit to or from our territories on the Pacific.

It will be seen that this Treaty does not propose to take money from the public treasury to effect any object contemplated by it. It yields protection to capitalists who may undertake to construct any canal or railway across the isthmus, commencing in the southern part of Mexico, and terminating in the territory of New Granada. It *gives no preference to any one route over another*, but proposes the same measure of protection for all which ingenuity and enterprise can construct. Should this Treaty be ratified, it will secure in future the liberation of all Central America from any kind of foreign aggression.

At the time negotiations were opened with Nicaragua for the construction of a canal through her territory, I found Great Britain in possession of nearly half of Central America,

as the ally and protector of the Mosquito King. It has been my object in negotiating this Treaty not only to secure the passage across the isthmus to the Government and citizens of the United States, by *the construction of a great highway dedicated to the uses of all nations on equal terms*, but to maintain the independence and sovereignty of all the Central American Republics. The Senate will judge how far these objects have been effected.

If there be any who would desire to seize and annex any portion of the territories of these weak sister Republics to the American Union, or to extend our dominion over them, I do not concur in their policy; and I wish it to be understood in reference to that subject, that I adopt the views entertained, so far as I know, by all my predecessors.

The principles by which I have been regulated in the negotiation of this Treaty are in accordance with the sentiments well expressed by my immediate predecessor on the 10th of February, 1847, when he communicated to the Senate the Treaty with New Granada for the protection of the railroad at Panama. It is in accordance with the whole spirit of the resolution of the Senate of the 3rd of March, 1835, referred to by President Polk, and with the policy adopted by President Jackson (immediately after the passage of that resolution), who despatched an agent to Central America and New Granada, 'to open negotiations with those Governments for the purpose of effectually protecting, by suitable Treaty stipulations with them, such individuals or companies as might undertake to open a communication between the Atlantic and Pacific Oceans by the construction of a Ship-Canal across the isthmus which connects North and South America, and of securing for ever, by such stipulations, *the free and equal right* of navigating such canal to all such nations on the payment of such reasonable tolls as might be established to compensate the capitalists who should engage in such undertaking and complete the work.

This message states in express terms that the object of the Treaty was to provide that any Canal wherever situate should be open and free to all nations on equal terms. But it may be convenient at this stage to make

an observation on the alternative routes proposed, because it has been sometimes argued that the Panama route was in a different position, on the ground that the preamble and the first seven articles of the Treaty refer, as you will have noticed, to the Nicaraguan project only. In my judgement there is no distinction of substance. The eighth Article covers the Panama route, and states that the arrangement between the two Governments was not limited to the Nicaraguan route (although at that time that project was the one thought most practicable), but was to extend to any other communication by any route eventually adopted. At the outset of the negotiations there had been some question as to the desirability of a survey of the Isthmus, in order to definitely fix on a route before entering into a Convention, but the United States representative had replied that it would be better to leave this to the capitalists concerned, and that the desire of the United States was 'to see completed at an early day great commercial highways from ocean to ocean protected by ample guarantees of neutrality from the selfishness of great nations, and the factiousness of such nations, and *open alike to all*'. This gives added force to the passage of the President's message now before you, in which he describes the Treaty as applying to the Panama route, as well as to every other interoceanic communication which might be adopted to shorten the transit to or from the United States territories or the Pacific, and says that his policy is the same as that of President Polk and of President Jackson, that any ship-canal across the Isthmus should be open to all nations on equal terms. The conclusion is, as I submit, that the parties to the Treaty intended to apply the condition of equal treatment to the Panama or any other route which might be adopted as well as to the Nicaraguan project. It is impossible to contend that either of

the two Powers, after the signing of the Convention, were free to obtain a treaty for exclusive treatment from New Granada, or a grant from the Government of that country of sovereign powers over the Panama Canal unfettered by this arrangement.

I have now dealt with the Clayton-Bulwer Treaty of 1850 sufficiently as I hope to enable you to understand the purport of it, and the extent of the obligations by which the parties to it intended to bind themselves. In short, the object was to provide that neither Power should have a predominant interest in the new waterway wherever it was made, but that it should be available for the commerce of the two Powers.

### Proposals to Modify the Clayton-Bulwer Treaty.

The Canal project was not proceeded with on the signing of the 1850 Treaty, but about 1880 the matter was taken up in France, and a French Company was formed to construct a canal by way of Panama, and there was talk of a European guarantee. The United States Government were opposed to this proposal, and in a dispatch of June 24 in that year Mr. Blaine sets out their views upon the question of policy involved at some length.[1] Lord Granville in his reply (November 10) confines himself to stating that the position, as between Great Britain and the United States, is controlled by the Treaty of 1850. Mr. Blaine's further letter of November 19 is instructive. He lays stress on the great strategetic importance of the Canal to the United States, and claims that they ought to have the control of it. For this reason he asks for a modification of the Clayton-Bulwer Treaty, which he says, as it stands, 'practically concedes to Great Britain the control of whatever Canal may be constructed,' because with her naval forces she could

[1] *British State Papers*, vol. lxxiii, p. 851.

seize it at any time before it could be fortified. The modifications desired are set out in specific terms; the first of them is to relieve the United States of the prohibition against controlling the Canal. But while Mr. Blaine asks for this change, he couples his request with a specific declaration as to equality made in these terms, 'nor does the United States seek any exclusive or narrow commercial advantage. It frankly agrees, and will by public proclamation declare, at the proper time, in conjunction with the Republic on whose soil the Canal may be located, that the same rights and privileges, the same tolls and obligations for the use of the Canal, shall apply with absolute impartiality to the merchant marine of every nation on the globe.'[1]

There followed a long diplomatic correspondence,[2] with no result,[3] and the exchange of views is only of interest as showing that the condition of equal treatment was to remain in force in the event of the Treaty being modified.

The question again slumbered, but in 1898 the necessity for some short cut by sea between the two oceans was brought home to the people of the United States in a practical way. They were at war with Spain, but the *Oregon* on the Pacific Coast could not be brought to the area of operations in the Atlantic except by travelling round Cape Horn, a voyage of some 13,000 miles; an impressive illustration of the fact that unless there were some Canal, the United States fleet on the two seaboards could not be united except after a delay which might, in some circumstances, prove fatal. Moreover, new territories in the Pacific had been just acquired, the Hawaiian Islands and the Philippines; and

[1] *British State Papers*, vol. lxxiii, p. 863.
[2] Ibid., vol. lxxiii, pp. 851–915.
[3] Ibid., vol. lxxiv, pp. 785–795.

for them the Canal route was specially needed. For these reasons it was realized to be essential for the United States to have some Canal, and to have that Canal under United States control. But, before this could be done, it was necessary to get rid of the restrictions imposed by the Treaty of 1850.

### The Hay-Pauncefote Treaty of 1901.

Then what was the position in 1900? The United States were seeking to get rid of the obligation which prevented them from constructing the Canal themselves; they approached Great Britain, and she agreed to release them from that obligation.[1] It followed, since the Canal was to be under the control of the United States, that it was no longer necessary for Great Britain to join in any guarantee for the protection of it, the United States were competent to do that alone. But did the parties intend also to give up the condition of equality of treatment? I think not. There is no word in the new Treaty nor is there any suggestion to be found in the negotiations that the parties intended to abandon the 'great design' of the Convention of 1850, namely, that the Canal was to be 'neutralized', in the sense that it was to be open for the benefit of the two nations, and of all other nations who would agree to treat it from that point of view; and that it was to be for this common use on equal terms. If that fundamental condition was to be abolished, and the whole character of the enterprise to be altered, the change must have been the subject of discussion, and the Treaty would have given effect to it expressly. But neither in the negotiations nor in the Treaty is there any suggestion of it. Moreover, it is very difficult to believe that the parties could have intended to make such a change. Here was

[1] Art. II, see App. B, *post*, p. 44.

a bargain made in 1850 between commercial rivals to ensure equal treatment for their trade; that bargain was in force and bound both nations; it is, to say the least of it, extremely unlikely that Great Britain intended to make a present to her rival, not only of the right to control the Canal, but also of the right to discriminate against her trade. There would have been nothing to be gained on the British side by such a surrender of her rights under the existing Treaty, indeed, if the United States were to be entitled to the discrimination that is now claimed, there would have been but little use in having any Treaty at all.

But the intention of the parties can be placed beyond doubt. It can be shown by direct evidence that it was the purpose of those who actually took part in the negotiation of the new Treaty to preserve the condition of equal treatment. Senator Hay, from whom the Treaty takes its name, speaking on January 15, 1904, described the effect of it in these words:

'The Clayton-Bulwer Treaty was conceived to form an obstacle and the British Government therefore agreed to abrogate it, the United States only promising in return to protect the Canal and keep it open on equal terms to all nations in accordance with our traditional policy.'

Mr. Choate, the United States Ambassador in London at the time, was one of the signatories of the Memorandum addressed to the American people on March 15 of this year, in which the effect of both Treaties is stated in the following passage:

'The great design of both treaties, that of 1850 and that of 1901, was to promote the construction and maintenance of a ship-canal between the two oceans, for "the benefit of mankind, on equal terms to all", and to protect the neutralized canal effectively when built. In urging on the British Government the making of the Clayton-Bulwer Treaty, the American

negotiator said to Lord Palmerston: "The United States sought no exclusive privilege or preferential right of any kind in regard to the proposed communication (that is, a canal or railroad), and their sincere wish, if it should be found practicable, was to see it dedicated to the common use of all nations on the most liberal terms and a footing of perfect equality for all. That the United States would not, if they could, obtain any exclusive right or privilege in a great highway which naturally belonged to all mankind."[1] This statement expresses accurately the avowed intention and resolve of the United States from 1850 to 1912 concerning any Panama Canal. All treaties on the subject are based on this intention and resolve, many times reiterated by official representatives of the American Government.'

Here we have distinct and unequivocal declarations by the two statesmen concerned in negotiating this Treaty on behalf of the United States, and so far as the question is one of intention, their evidence of that intention is, as it seems to me, to all intents and purposes conclusive of the matter.

And if we turn back to the text of the Treaty we find that effect is given to this intention in terms which are little short of express. I have already read to you the Preamble, but the meaning of it is, I hope, more clear since we have discussed the earlier Convention to which it refers. The Preamble states that the 'general principle' of neutralization established by Article VIII of that Convention is to remain unimpaired, and the principle of neutralization mentioned in that Article is, as I have endeavoured to show you, that the Canal shall be open to the subjects and the citizens of Great Britain and the United States and of other States conforming to the arrangement on equal terms. Neutralization is a wide term; it is used in International Law in various senses, and diplomats who draft agreements do not always

[1] Cited, p. 12, *supra*.

trouble themselves to employ exact language, but it is clear from a perusal of Article VIII of the earlier Treaty, which has been already before you, that the neutralization referred to is the common use on equal terms, or, in other words, the condition that neither Power is to be able to discriminate against the other. There is no reference in Article VIII to war or to neutrality in the sense in which that term is employed in relation to war, the Article refers only to protection and to user by all nations on equal terms. Then we come to the direct provision contained in the first Rule of Article III, that the Canal is to be free and open to the vessels of all nations on terms of entire equality with no discrimination. The words are not ambiguous or vague, there is no exception or qualification to them, and there seems no reason why they should not be construed in their ordinary sense. If it had been intended to abandon the principle of equality which had governed the relations between the two countries from the outset, one would have expected to find at this place some express exemption of the vessels of the United States. But there is none.

So far I have stated to you considerations which go to show that the construction contended for by Great Britain is the correct one. But a contrary view is taken by eminent statesmen and lawyers in America whose opinion on such matters must command attention and respect. I must now endeavour to put before you the arguments by which their view is supported, and this can best be done by examining the Memorandum submitted to the Senate by Mr. Taft on August 24, 1912. To this Memorandum Sir E. Grey has made a reasoned reply, and we have not yet seen the answer of the United States to his argument; to that extent therefore we must withhold our judgement for the present, but the

American case is sufficiently expounded in Mr. Taft's Memorandum to enable us to appreciate the main lines on which it is based. The effect of it is that there is no restriction on the United States in the matter of tolls save this—that they must give to British vessels the most favoured nation treatment, or, in other words, that they cannot charge higher tolls on British vessels than those charged on the vessels of any other foreign Power; but that as between British vessels and United States vessels they can discriminate to any extent they please. Mr. Taft argues that the Treaty imposes no fetter on the sovereign rights of the United States to do what it pleases in the matter of tolls, because, as he says, the rules in Article III are a mere declaration of policy on the part of the United States in order to effect the neutralization of the Canal in time of war; in other words, that all nations who agree to treat the Canal as neutral in war are to have like treatment, but that the power of the United States with regard to their own vessels is not covered by or referred to in the Article. In the view thus presented Article III refers only to the action of foreign Powers, and the words 'all nations' in Rule 1 refer to foreign Powers only and do not include the United States.

We must agree that as a rule of construction treaties are not to be read as involving any surrender of sovereign rights in the absence of express and distinct provision to that effect, and the right to discriminate in favour of the shipping of nationals is of course inherent in sovereignty apart from Treaty or other restrictions. But this rule of construction does not apply in this case, because the United States were not sovereigns of the Canal territory at the time of the Treaty, nor was it within the contemplation of the parties that the United States would become sovereigns

of that territory. It is therefore on those who seek to cut down the plain and ordinary meaning of the words of Art. III to show that some restriction was intended; if no such evidence is given, the words must be read as meaning what they say. But the evidence is all the other way, for the history of the bargain between the two parties proves, as I have submitted to you, that equality of treatment was intended, from the first up to the last, to be the paramount and fundamental condition of both Conventions, and there is no reason for holding that the purpose of the Article is limited to neutralization in time of war.

In further support of Mr. Taft's argument it is contended that the remaining rules of Article I, those for instance which deal with blockade and revictualling and the embarkation of troops and the like, do not apply to the United States, since the Canal is now in their territory and they can do what they please on it; it follows that Rule 1 must be applied in the same way and be read as referring to all nations other than the United States. But here again the answer made by His Majesty's Government appears to be complete. The Rules were adapted from those applied in the Treaty of Constantinople of 1888 to the Suez Canal, but they were adapted at a time when it was not contemplated that the United States would be the practical sovereign of the territory through which the Canal passed, as they have since become. Read in that light the whole of the Rules did apply to the United States, but in the Suez Convention there are further Articles reserving the right of Turkey and Egypt as the territorial sovereigns, and if the present condition of affairs in Panama had been anticipated similar reservations would have been added to this Treaty of 1901. The American argument on this point could not have

arisen if the conditions had continued as they were at the time the Treaty was negotiated and as both parties contemplated they would always remain. The fact that Rules 2 to 6 have now a changed effect, owing to the unexpected change in these conditions, cannot be an argument on the construction of Rule 1. And it is important to observe here that the analogy of the Suez Canal Convention can only support the argument for equality of tolls, for it has never been suggested that either Turkey or Egypt could be in a different position with regard to Suez tolls from that of any other nation.

In my judgement, therefore, the contention of the United States, so far as it has been yet developed, is not a sound contention; it is a contention based on too narrow a reading of the words of the Treaty, and can be maintained only if previous history and the negotiation between the parties are put out of sight. Diplomatic agreements must not be interpreted by the same strict rules of construction as are applied to legal documents; it is the intention of the parties which must govern treaties rather than the particular form in which effect is endeavoured to be given to that intention; and in this case, as I submit to you, the intention of both parties has been throughout manifest beyond doubt.

## Acquisition of the Canal Territory by the United States.

We must now turn to the events which have occurred since the ratification of the Treaty. And first as to the change of route. The Nicaraguan route had held the field until after the completion of the Treaty of 1901; the French Company under M. de Lesseps had been working for some years in Panama, but it was evident

that they must fail, and the difficulties they had encountered were thought to be fatal to that route. But after the conclusion of the Treaty the subject was discussed very thoroughly in the Senate of the United States, and as a result of that discussion American opinion underwent a change and it was determined to proceed with the Panama route. For that purpose an Act was passed authorizing the President to buy up the assets of the French Company, and this was done. The position then was that the United States were the holders of the Canal Concession, but the State of Colombia were the sovereigns of the territory through which the Canal passed. But in the following year, as a result of events which it is not necessary for our purpose to discuss, there was a revolution in that State; Panama established itself as an independent Republic, and forthwith entered into a Convention with the United States, known as the Hay-Varilla Convention of 1903, by which the United States became, to quote the words of Sir Edward Grey, 'the practical sovereigns of the Canal Territory.' This was a departure from the state of things contemplated at the time of the Treaty of 1901, but it made no difference to the rights under that Treaty, indeed the preservation of those rights was expressly provided for by Article XVIII of the Treaty with Panama, which declared that

> 'the Canal when constructed, and the entrances thereto, shall be neutral in perpetuity and shall be opened on the terms provided for by section 1 of Article III of and in conformity with all the stipulations of the Treaty entered into by the Governments of the United States and Great Britain on November 18th, 1901';

and if further protection were necessary it would be found in Article IV of the Treaty of 1901. The result

is that the acquisition of sovereignty by the United States did not alter or affect the obligation they were under in regard to British shipping.

### The Tolls to be Imposed.

From that time the work on the Panama Canal was pushed on, and the project has been carried through to a successful issue with that splendid energy and fertility of resource which is characteristic of the American nation. And now the work is approaching completion, and the question of construction of the Treaty has been raised in a direct way by a publication of the list of tolls to be charged on shipping using the Canal. That list has been issued under the authority of an Act passed in 1912 entitled the Panama Canal Act, under which the Legislature of the United States have assumed powers with regard to tolls, which, in the view of His Majesty's Government, are contrary to the stipulations of 1901. I need not trouble you with any detailed examination of the Act; it is composed of fourteen sections, and there are many matters included within it which are not relevant to the exact issues we are engaged in discussing, although some of them may become of importance in the future. It is only necessary to-day to refer to section 5. This section authorizes the President to prescribe, and from time to time to change the tolls to be levied, and it makes two provisions in regard to those tolls which are material. In the first place, it provides that the tolls when based on net registered tonnage shall not exceed one dollar and twenty-five cents per ton, nor be less, *other than for vessels of the United States and its citizens*, than the estimated proportionate cost of the actual maintenance and operation of the Canal. In the second place, it enacts positively that no tolls shall be levied upon vessels engaged in the

coastwise trade of the United States. These two provisions raise somewhat different considerations and I propose to discuss them separately.

As to the first of them, you will observe that the minimum tolls exacted are to apply only to foreign ships. In regard to vessels of the United States or its citizens there is no fixed minimum at all and it is left to the President to prescribe such reduced tolls for them as he pleases. In other words, this provision authorizes the President to discriminate between British vessels and United States vessels engaged in foreign trade, and that this is the intention is clear from the Memorandum of the President which accompanies the Act: to which your attention has been called. I have already discussed this wider claim and submitted to you that it is untenable. The power has not yet been exercised, for the tolls prescribed do not differentiate between vessels engaged in foreign trade of whatever flag, but the Legislature has endorsed the claim and Great Britain cannot allow that to go unchallenged.

The second provision exempting coastwise shipping of the United States stands on a footing which may seem on the first view to be somewhat different, although, in my judgement, the difference is not a real one. Coastwise shipping, according to the law of the United States, is restricted to vessels flying the United States flag, and it is contended that since foreign vessels cannot take part in coastwise trade, there is no competition in regard to that trade between United States vessels and foreign vessels, and therefore no discrimination within the meaning of the Treaty. But if the basis on which this argument rests be examined it will be found to be wrong in fact. Coastwise vessels, as defined by the law of the United States, will compete with foreign-going vessels, and a discrimination in their favour will defeat

the protection which Great Britain alleges the Treaty has given to her shipping. 'Coastwise' is not a term of art, it has no precise limits, its construction and extent depend on the municipal law of each country and vary according to that law. In England coastwise trade is open to the ships of all flags, but in the United States and many other countries it is reserved for the ships of nationals. But the extent of the reservations is not uniform. It may be limited to voyages from port to port which do not involve the crossing of the open sea or the passage through the territorial waters of some other State; on the other hand, it may be extended to cover distant voyages across open seas with calls at foreign ports. The coastwise trade of France includes voyages between French ports in the Channel and Atlantic and those in the Mediterranean; Russian law treats the trade between her European ports and Vladivostock by any route as coastwise trade; and the law of the United States takes an even wider view, for under it trade between any port of the United States and the Philippines or the Hawaiian Islands or Porto Rico is coasting trade. It follows that American vessels trading between New York and the ports of Washington State on the Pacific Coast, or between New York and Manila, to take two instances, are all to be within the tolls exemption. It is manifest that trade of so wide an extent as this must compete with foreign-going ships. For instance, take the case of trade to the Western coast of the United States. British ships going from London to San Francisco through the Canal must pay tolls, and those tolls must increase the cost of the goods delivered at San Francisco, and thereby make them the less able to compete with goods from New York to the same port. More than that, the exemption would tend to divert even foreign trade from British bottoms to the free vessels of

the United States, there would be transhipment of cargo at an American port in order that the goods might secure the benefits of the free passage. There is no proposal to give a similar exemption for the coastwise trade of Canada, and the discrimination must necessarily press with peculiar hardship on the trade by sea between, say Vancouver and Montreal which has to compete with trade following almost the same lines, say from Seattle in Washington State, only a short distance from the Canadian border on the West, to the ports of the State of Maine equally near the Canadian territory on the East. These objections are the more serious because we are told that under the American law there is nothing to prevent 'coasting' vessels from engaging in foreign trade; they would not lose the exemption from tolls by combining that trade with their coastwise trade: nor is there any restriction on the power of the American Legislature to extend the definition of coastwise trade indefinitely in the future. It might be possible to defend an exemption limited to coasting trade, if that trade were confined to the small craft which ply between neighbouring harbours, carrying goods of small value and purely of domestic trade; *de minimis non curat lex*, and petty trading of that kind could be no subject of controversy between great nations. But coastwise trade as defined by the law of the United States is 'coastwise' not in fact, but by a fiction of the law; it is coastwise only in the understanding of the enactment which deals with it; in fact, it is not coasting trade at all, it is not trade of purely domestic concern, and it does compete with foreign trade. Therefore, if this exemption from tolls were conferred, United States vessels would be at an advantage as compared with other vessels engaged in the same trade by reason of a discrimination in breach of the Treaty.

There is a further answer, too, which is made to the contention of the United States on this same point. You will remember that by Rule 1 of Article III of the Treaty the charges of traffic are to be just and equitable, and that is construed by both parties to mean that the tolls must bear a fair relation to any expenditure on the Canal. It is obvious that if any class of vessels is exempted from tolls other vessels which do not share in that exemption must pay more, since that cost must be divided among them alone. This objection is of weight.

There is one further argument to which I must call your attention. It is sought to defend the exemption of United States vessels on the ground that it is in substance a mere subsidy to shipping; that there is nothing to prevent the United States or Great Britain or any other nation from granting bounties to their ships going through the Panama Canal, and that it is only a matter of form whether a bounty be given by exemption or by refund, or by direct gift, or in any other way. But does not this argument go too far? It goes to this, that the most distinct provision in a treaty for equal treatment would mean nothing at all; because exemption could be given to national ships without any breach of those provisions; in fact that such a stipulation could never be worth the cost of the ink used in committing it to paper. This can hardly be the right view. The policy of the Treaty is that the shipping of the two parties is to receive equal treatment; it follows that both or neither must have exemption. The extent to which the parties may go in order to assist their commerce by subsidies out of their own funds is another matter, and must largely depend on the particular circumstances of the grant. But this much is clear, that if tolls are charged at all they must be charged and paid on all ships under the Treaty. And this is the more certain because as

we have just seen, the amount of tolls on coastwise vessels must be taken into account in order to fix the amount payable on other vessels.

### Diplomatic Discussion.

The diplomatic controversy was begun by a note from the British *charge d'affaires* on July 8, 1912, in which objection was taken to the proposals then under consideration for the exemption of all American shipping or for the exemption of coastwise vessels only. The Panama Canal Act was passed on August 24 following, and on signing it the President published a Memorandum to which reference has been made, in which he claimed that the United States had full powers to exempt all American shipping if it were thought proper so to do, and argued that exemption was only a form of subsidy, and that in any view of the Treaty subsidies were not covered by it. On November 14 Sir Edward Grey presented a reply to the American contention which deals with that raised in Mr. Taft's Memorandum at length and concludes with a statement that His Majesty's Government are ready to submit the question to arbitration. The remaining dispatches exchanged between the two Governments, that of July 17 from Mr. Knox and the reply to it of February 27 from Mr. Bryce, are confined to the question of arbitration. Mr. Knox takes the view that no question has yet arisen for determination since the President has not yet made use of the power given him by the Canal Act to discriminate against all foreign shipping, and because the tolls to be charged on foreign shipping have been fixed after taking into account the amount of the tolls payable on exempted vessels. His Majesty's Government replied that the passing of a statute in contravention of a Treaty does afford ground for remonstrance, and that it is not

necessary to wait till actual loss has been occasioned to British vessels. I refer to these matters in order to bring the history of the dispute up to date. There is in force between the two countries a Treaty of Arbitration of April 4, 1908, in which it is agreed that differences relating to the interpretation of Treaties (with certain exceptions which do not cover the present question) should be referred to the Hague Tribunal. I know of no rule of international law, nor of any treaty obligation which obliges nations to wait until some actual loss has been occasioned before they can settle their differences by arbitration, and I should regard the existence of any such principle as disastrous to the cause of peace. But in this case we have more than a mere difference of opinion because the United States have passed a statute founded on the construction of the Treaty to which Great Britain objects, and that action has caused direct and present injury to British interests since it is impossible for shipowners or traders to make final arrangements to meet the new trade-route until it is known whether they are to be at a disadvantage as compared with their American rivals.

But we need not discuss the proposal for arbitration further. We may rest well assured that if the provisions of the Act to which exception is taken are not repealed, the dispute will be referred to some international Court of Justice. From the first years of their history the United States have been the constant advocates of the settlement of differences between nations by arbitration, and their action has been of a value to humanity which cannot be estimated too highly. We need not, we cannot, suppose that they will depart from their accepted policy on the present occasion, for by so doing they would strike a death blow at a cause of which it is their glory that they have been the foremost champions.

## Conclusion.

I have now completed the task I undertook to-day. I have put before you an outline of the controversy between the two countries from the time of the negotiations in 1850 up to the present day, and I have sketched the arguments on which the case on either side depends. I do not claim to have put the matter in any fresh light, my only object has been to give to the University some explanation of the points at issue, and to state for your consideration the opinion I have formed upon the matter. In my judgement the Treaty of 1901 does apply to the shipping of the United States as well as to the shipping of this country; it does provide that the same tolls must be charged on the vessels of the two countries. The exemption of American coastwise shipping is, as I think, a breach of that provision; and that exemption cannot, in my view, be defended on the ground that it is a form of subsidy.

## NOTE.

For some of the facts and quotations referred to above I am indebted to the speeches made by the Hon. Wallace Nesbitt, K.C., before the Canadian Club, Hamilton, on December 6, 1912[1]; by the Hon. Elihu Root in the United States Senate on January 21, 1913,[2] and by the speakers on either side in the debate which took place at the Seventh Annual Meeting of the American Society of International Law at Washington in April 1913.[3] To these authorities and to the diplomatic correspondence of which mention has been made, I would refer those who seek further information than I have been able to give within the limits of this lecture.

[1] Rous & Mann, Ltd., Toronto.

[2] World Peace Foundation, 40 Mt. Vernon St., Washington; vol. iii, No. 2.

[3] Byron S. Adams, Washington, D.C.

# APPENDIX

## A

## CLAYTON-BULWER TREATY, 1850

CONVENTION between Her Majesty and the United States of America, relative to the Establishment of a Communication by Ship-Canal between the Atlantic and Pacific Oceans.

Signed at Washington, April 19, 1850.

(Ratifications exchanged at Washington, July 4, 1850.)

Her Britannic Majesty and the United States of America being desirous of consolidating the relations of amity which so happily subsist between them, by setting forth and fixing in a Convention their views and intentions with reference to any means of communication by Ship-Canal, which may be constructed between the Atlantic and Pacific Oceans, by the way of the River San Juan de Nicaragua, and either or both of the Lakes of Nicaragua or Managua, to any port or place on the Pacific Ocean;

Her Britannic Majesty has conferred full powers on the Right Honourable Sir Henry Lytton Bulwer, a Member of Her Majesty's Most Honourable Privy Council, Knight Commander of the Most Honourable Order of the Bath, and Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty to the United States; and the President of the United States on John M. Clayton, Secretary of State of the United States, for the aforesaid purpose; and the said Plenipotentiaries, having exchanged their full powers, which were found to be in proper form, have agreed to the following Articles:—

### ARTICLE I.

The Governments of Great Britain and the United States hereby declare that neither the one nor the other will ever obtain or maintain for itself any exclusive controul over the

said Ship-Canal; agreeing that neither will ever erect or maintain any fortifications commanding the same, or in the vicinity thereof, or occupy, or fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America; nor will either make use of any protection which either affords, or may afford, or any alliance which either has, or may have, to or with any State or people, for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying, or colonizing Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America, or of assuming or exercising dominion over the same. Nor will Great Britain or the United States, take advantage of any intimacy, or use any alliance, connection, or influence that either may possess with any State or Government through whose territory the said canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the subjects or citizens of the one, any rights or advantages in regard to commerce or navigation through the said canal, which shall not be offered, on the same terms, to the subjects or citizens of the other.

ARTICLE II.

Vessels of Great Britain or the United States traversing the said canal shall, in case of war between the Contracting Parties, be exempted from blockade, detention, or capture by either of the belligerents; and this provision shall extend to such a distance from the two ends of the said canal as may hereafter be found expedient to establish.

ARTICLE III.

In order to secure the construction of the said canal, the Contracting Parties engage that if any such canal shall be undertaken upon fair and equitable terms by any parties having the authority of the Local Government or Governments through whose territory the same may pass, then the persons employed in making the said canal, and their property used or to be used for that object, shall be protected, from the commencement of the said canal to its completion, by the Governments of Great Britain and the United States, from unjust detention, confiscation, seizure, or any violence whatsoever.

### Article IV.

The Contracting Parties will use whatever influence they respectively exercise with any State, States, or Governments possessing, or claiming to possess, any jurisdiction or right over the territory which the said canal shall traverse, or which shall be near the waters applicable thereto, in order to induce such States or Governments to facilitate the construction of the said canal by every means in their power; and, furthermore, Great Britain and the United States agree to use their good offices, wherever or however it may be most expedient, in order to procure the establishment of two free ports, one at each end of the said canal.

### Article V.

The Contracting Parties further engage that when the said canal shall have been completed, they will protect it from interruption, seizure, or unjust confiscation, and that they will guarantee the neutrality thereof, so that the said canal may for ever be open and free, and the capital invested therein secure. Nevertheless, the Governments of Great Britain and the United States, in according their protection to the construction of the said canal, and guaranteeing its neutrality and security when completed, always understand that this protection and guarantee are granted conditionally, and may be withdrawn by both Governments, or either Government, if both Governments, or either Government, should deem that the persons or company undertaking or managing the same adopt or establish such regulations concerning the traffic thereupon, as are contrary to the spirit and intention of this Convention; either by making unfair discriminations in favour of the commerce of one of the Contracting Parties over the commerce of the other, or by imposing oppressive exactions, or unreasonable tolls upon passengers, vessels, goods, wares, merchandise, or other articles. Neither party, however, shall withdraw the aforesaid protection and guarantee without first giving six months' notice to the other.

ARTICLE VI.

The Contracting Parties in this Convention engage to invite every State with which both or either have friendly intercourse, to enter into stipulations with them similar to those which they have entered into with each other, to the end that all other States may share in the honour and advantage of having contributed to a work of such general interest and importance as the canal herein contemplated; and the Contracting Parties likewise agree that each shall enter into Treaty stipulations with such of the Central American States as they may deem advisable for the purpose of more effectually carrying out the great design of this Convention; namely, that of constructing and maintaining the said canal as a ship communication between the two oceans for the benefit of mankind, on equal terms to all, and of protecting the same; and they also agree that the good offices of either shall be employed, when requested by the other, in aiding and assisting the negotiation of such Treaty stipulations; and should any differences arise as to right or property over the territory through which the said canal shall pass, between the States or Governments of Central America, and such differences should in any way impede or obstruct the execution of the said canal, the Governments of Great Britain and the United States will use their good offices to settle such differences in the manner best suited to promote the interests of the said canal, and to strengthen the bonds of friendship and alliance existing between the Contracting Parties.

ARTICLE VII.

It being desirable that no time should be unnecessarily lost in commencing and constructing the said canal, the Governments of Great Britain and the United States determine to give their support and encouragement to such persons or company as may first offer to commence the same, with the necessary capital, the consent of the local authorities, and on such principles as accord with the spirit and intention of this Convention; and if any persons or company should already have, with any State through which the proposed Ship-Canal may pass, a contract for the construction of such a canal as

that specified in this Convention, to the stipulations of which contract neither of the Contracting Parties in this Convention have any just cause to object, and the said persons or company shall, moreover, have made preparations and expended time, money, and trouble on the faith of such contract, it is hereby agreed, that such persons or company shall have a priority of claim over every other person, persons, or company, to the protection of the Governments of Great Britain and the United States, and be allowed a year, from the date of the exchange of the Ratifications of this Convention, for concluding their arrangements, and presenting evidence of sufficient capital subscribed to accomplish the contemplated undertaking; it being understood that if, at the expiration of the aforesaid period, such persons or company be not able to commence and carry out the proposed enterprise, then the Governments of Great Britain and the United States shall be free to afford their protection to any other persons or company that shall be prepared to commence and proceed with the construction of the canal in question.

### Article VIII.

The Governments of Great Britain and the United States having not only desired, in entering into this Convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection by Treaty stipulations to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America; and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, their joint protection to any such canals or railways as are by this Article specified, it is always understood by Great Britain and the United States, that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable, and that the same canals or railways, being open to the subjects and citizens of Great Britain and the United States on equal terms, shall also be open on like terms to the subjects and citizens

of every other State which is willing to grant thereto such protection as Great Britain and the United States engage to afford.

ARTICLE IX.

The Ratifications of this Convention shall be exchanged at Washington within six months from this day, or sooner if possible.

In faith whereof we, the respective Plenipotentiaries, have signed this Convention, and have hereunto affixed our seals.

Done at Washington, the nineteenth day of April, Anno Domini one thousand eight hundred and fifty.

(*Signed*) HENRY LYTTON BULWER. (L.S.)
(*Signed*) JOHN M. CLAYTON. (L.S.)

## B

## HAY-PAUNCEFOTE TREATY, 1901

TREATY between the United Kingdom and the United States of America relative to the establishment of a communication by Ship-Canal between the Atlantic and Pacific Oceans.

Signed at Washington, November 18, 1901.

(Ratifications exchanged at Washington, February 21, 1902.)

His Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, and Emperor of India, and the United States of America, being desirous to facilitate the construction of a ship-canal to connect the Atlantic and Pacific Oceans, by whatever route may be considered expedient, and to that end to remove any objection which may arise out of the Convention of the 19th April, 1850, commonly called the Clayton-Bulwer Treaty, to the construction of such canal under the auspices of the Government of the United States, without impairing the 'general principle' of neutralization established in Article VIII of that Convention, have for that purpose appointed as their Plenipotentiaries :—

His Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland and of the British Dominions

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beyond the Seas King, and Emperor of India, the Right Honourable Lord Pauncefote, G.C.B., G.C.M.G., His Majesty's Ambassador Extraordinary and Plenipotentiary to the United States; and

The President of the United States, John Hay, Secretary of State of the United States of America;

Who, having communicated to each other their full powers which were found to be in due and proper form, have agreed upon the following Articles:—

### Article I.

The High Contracting Parties agree that the present Treaty shall supersede the afore-mentioned Convention of the 19th April, 1850.

### Article II.

It is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost, or by gift or loan of money to individuals or Corporations, or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present Treaty, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

### Article III.

The United States adopts, as the basis of the neutralization of such ship-canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:—

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed

within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the Regulations in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same Rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

5. The provisions of this Article shall apply to waters adjacent to the canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

6. The plant, establishments, buildings, and all works necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purpose of this Treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal.

### Article IV.

It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the High Contracting Parties under the present Treaty.

ARTICLE V.

The present Treaty shall be ratified by His Britannic Majesty, and by the President of the United States, by and with the advice and consent of the Senate thereof; and the ratifications shall be exchanged at Washington or at London at the earliest possible time within six months from the date hereof.

In faith whereof the respective Plenipotentiaries have signed this Treaty and thereunto affixed their seals.

Done in duplicate at Washington, the 18th day of November, in the year of our Lord one thousand nine hundred and one.

(Seal.) (*Signed*) PAUNCEFOTE.
(Seal.) (*Signed*) JOHN HAY.

## C

## TREATY BETWEEN THE UNITED STATES AND PANAMA (HAY-VARILLA), 1903

Constitutes the United States, in the words of Sir E. Grey, 'practical sovereign' over the Canal territory.

ARTICLE XVIII.

The Canal when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by section 1 of Article III of, and in conformity with all the stipulations of the Treaty entered into by the Governments of the United States and Great Britain on November 18th, 1901.

## D

## PANAMA CANAL ACT, 1912

Section 5. That the President is hereby authorized to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal. . . . No tolls shall be levied upon vessels engaged in the coastwise trade of the United States.

That section forty-one hundred and thirty-two of the Revised Statutes is hereby amended to read as follows:

Section 4132. . . . Tolls may be based upon gross or net registered tonnage . . . When based on net registered tonnage for ships of commerce the tolls shall not exceed one dollar and twenty-five cents per net registered ton, nor be less, other than for vessels of the United States and its citizens, than the estimated proportionate cost of the actual maintenance and operation of the Canal. . . .

Oxford: Horace Hart M.A., Printer to the University

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